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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 609

AERONAUTICAL RADIO, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–12a) is reported at 335 F. 2d 304. The Commission's report and order (R. 140–172)[1] is reported at 34 F.C.C. 811, and its memorandum opinion and order denying rehearing (R. 202–225) is reported at 28 Fed. Reg. 10911.

[1] "R. ——" references are to "Petitioners' Appendix" in the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. 13a-15a) was entered on August 5, 1964, and the petition for certiorari was filed on October 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Title V of the Independent Offices Appropriation Act of 1952, which authorizes federal agencies to prescribe, for services performed and privileges granted, "fair and equitable" fees "taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts", is a valid delegation of authority.

2. Whether the schedule of filing fees adopted by the Federal Communications Commission constituted a reasonable implementation of that Act.

STATUTE INVOLVED

Title V of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 5 U.S.C. 140, is set forth in the petition for certiorari, pp. 3–4.

STATEMENT

The petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit upholding the legality of a schedule of filing fees adopted by the Federal Communications Commission for applications for licenses, certificates and per-

mits which it issues. Petitioners are all either FCC licensees or associations whose members are FCC licensees. The background facts are as follows:

Title V of the Independent Offices Appropriation Act of 1952, 5 U.S.C. 140, authorizes all federal agencies to establish, through appropriate regulations, a system of fair and equitable fees for "any * * * service, * * * privilege, * * * license, * * * or similar thing of value * * * granted * * * or issued" by such agencies to or for any person, except those engaged in the transaction of official business for the government. The statute provides that any fees charged shall be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *." The expressed purpose of the Act was to permit federal agencies to appraise their operations and devise a schedule of fees which would make "self-sustaining to the full extent possible" many of the services they render. As the House Report on the Act makes clear, Congress was "concerned that the Government [was] not receiving full return from many of the services which it renders to special beneficiaries." H. Rep. No. 384, 82d Cong., 1st Sess., p. 2.

On February 16, 1962, the Commission released a notice of proposed rulemaking (Docket No. 14507, 27 Fed. Reg. 1729) setting out a proposed schedule of fees for its licensing and regulatory functions and inviting

public comments (R. 3–7).[2] The proposed fee schedule was broken down into three basic categories reflecting the major areas of Commission regulatory activity: broadcasting, common carrier, and safety and special radio services (*i.e.*, amateur, aviation, marine, fire, police, etc.) (see R. 148, 151, 155).[3a] Some 900 formal comments and over 500 letters were submitted to the Commission in response to the rulemaking notice (R. 142). As a result of these comments, some changes were made in the amounts specified in the original fee schedule, and a number of services were exempted entirely (see R. 150–151, 153–154). For example, in response to arguments that high fees might discourage the growth of FM radio stations and UHF television stations (see R. 150–151), those charges were reduced, respectively, from $150 to $50 and from $250 to $100 (compare R. 5 with R. 166). And organizations such as hospitals, which "use radio essentially for public safety purposes", were exempted (R. 153).[4]

The Commission found that establishment of a fee schedule was in the public interest in its administration of the Communications Act of 1934, noting that the Securities and Exchange Commission, the Immi-

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[2] An earlier proceeding (Docket No. 10869) proposing a schedule of fees had been instituted by the Commission on January 27, 1954. That proceeding was terminated in 1963 when the Commission instituted Docket No. 14507. (R. 143, n. 2.).

[3a] The proposed fees ranged from $100 for a television station to as low as $2 for modification of an amateur's license (R. 219–294).

[4] Later, in response to petitions for reconsideration, the Commission further modified the schedule to take account of other special circumstances (see, *e.g.*, R. 206–209).

gration and Naturalization Service, the Department of Defense, and the Federal Aviation Agency had made similar judgments in establishing charges for some of their services under Section 140 (R. 145); and it rejected various contentions that it did not have authority to act (R. 143–144). The schedule, as amended, was made effective as of January 1, 1964 (R. 163–164).

Petitioners appealed the Commission's order to the Seventh Circuit, which unanimously affirmed it (Pet. 1a–12a). The court of appeals held that the statute was a constitutional delegation of authority fully comporting with the standards laid down by this Court in *Yakus* v. *United States*, 321 U.S. 414, since the congressional objective was plain, the method of achievement was prescribed, and the guiding standards were adequate (Pet. 3a–4a). The court also rejected the contention that because the statute was enacted as part of an appropriation measure it contravened the Legislative Reorganization Act of 1946, 60 Stat. 812, 821, and the rules of the House and Senate. Finally, the court reviewed the record and found that in establishing fees the Commission had taken into consideration the standards specified in the statute and had not abused its discretion with regard to the weight assigned to each (Pet. 8a–12a).

ARGUMENT

The petition raises no substantial question warranting review by this Court. Delegations of authority of the kind employed by 5 U.S.C. 140 have uniformly been held constitutional, and it is settled that enact-

ment of a substantive law as part of an appropriation bill does not impair its validity. Petitioners' other contentions regarding the manner in which the Commission exercised its discretion under the statute were properly rejected by the court below.

1. The governing standard specified by Congress, that the fees be "fair and equitable", taken together with the directive that the agency consider, among other things, "cost to the Government, value to the recipient [and the] public policy or interest served", is, as the court below held, a statement of "Congressional ground rules * * * clear enough to limit the Commission" without being "too narrow to embrace all federal agencies" (Pet. 4a). The statute falls well within constitutional limits. This Court has recognized that in many situations "[t]he details on which fair judgment must be based are too shifting and judgment upon them calls for too specialized understanding to make direct congressional determination feasible." *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 610. In such situations, broad delegations to governmental agencies are sustained unless "there is an absence of standards for the guidance of the [agency's] action so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed * * *." *Yakus* v. *United States*, 321 U.S. 414, 426.

Applying this principle, this Court has upheld, for example, the standards of "fair and equitable" commodity prices, *Yakus* v. *United States*, *supra*; "fair, efficient and equitable distribution" of sugar allot-

ments, *Central Roig, supra;* "reasonable" coal prices, *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381; and the granting of radio licenses in the "public convenience, interest, or necessity", *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134.[4] Those decisions are dispositive of this case.[5]

2. There is no merit in the argument that Section 140 is invalid because enacted as a rider to an appropriation bill (Pet. 9–11). The authority of Congress to pass substantive legislation in appropriation acts is clear. *United States* v. *Dickerson,* 310 U.S. 554. Petitioners argue that *Dickerson* should be reconsidered (or distinguished) in view of the subsequent enactment of the Legislative Reorganization Act of 1946, 60 Stat. 812, which adopted as a Senate rule a prohibition against amending appropriation bills by

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[4] In asserting that Section 140 is "unprecedented" in the degree to which it delegates authority (Pet. 6–7), petitioners also overlook 28 U.S.C. 1911 (authorizing this Court to "fix the fees to be charged by its clerk") and 28 U.S.C. 1913 (providing that "[t]he fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States").

[5] Petitioners contend that, in testing the adequacy of the legislative delegation of authority in Section 140, the court below should have combined and considered as a single element not only the asserted inadequacies of the statute itself but also the alleged abuses committed thereunder by the Commission (Pet. 6–8). This argument erroneously implies that a valid delegation of authority may be rendered unconstitutional if the discretion it bestows is abused in practice. Petitioners cite no case so holding, and we think it plain that the constitutional adequacy of the statute and the propriety of the Commission's actions were properly treated as separate questions by the court of appeals.

attaching new or general legislation to them (Pet. 10–11, nn. 9, 10). But the short answer to petitioners' contention is that Section 140 was not an amendment. It was an integral part of the 1952 Appropriation Act from the time it was reported to the House from the Committee on Appropriations. See H. Rep. No. 384, 82d Cong., 1st Sess., pp. 2–3.

Moreover, it is clear that the provision against adding general amendments to appropriation bills was intended solely as a rule to guide the Senate, since it was specifically made subject to the further rule-making power of the Senate acting alone (Section 101(b) of the Reorganization Act, 60 Stat. 814). Like the similar House rule, it established a procedure whereby an amendment proposing new or general legislation, when appended to an appropriation bill, shall be subject to a point of order "and if the point is sustained, the bill shall be recommitted to the Committee on Appropriations" (Section 103(2)). No statute or rule purports to nullify substantive legislation adopted in appropriation bills.

3. While it is true that some would deem it wiser for Congress to consider the question of agency fees on an *ad hoc* basis, this is clearly a matter for legislative judgment. The Report of the House Committee on Appropriations recognized that other committees of Congress were considering the problem and that further legislation might result. Enactment of Section 140, the report stated, "would in no way conflict" with those studies. H. Rep. No. 384, 82d Cong., 1st Sess., pp. 2–3. In the meantime, as the

Seventh Circuit held, Section 140 remains the law.

4. Petitioners' final challenge is to the reasonableness of the fee schedule itself (Pet. 11–14). All of the matters raised were carefully considered by the court below (Pet. 6a–12a), which correctly held that "[t]he weighing of these statutory factors or 'whether all * * * must play a quantitative share' in the judgment made, was for the Commission" acting in its discretion (Pet. 8a).* See *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 611. The court concluded that this discretion had not been abused because, among other reasons, "the care displayed [by the Commission] in adjusting fees, after comments and objections from licensees, * * * compels the conclusion that there is no merit to petitioners' claims" (Pet. 10a). That determination rests on a fair assessment of the record, a function "which Congress has placed in the keeping of the Courts of Appeals", and further review by this Court is therefore unwarranted. *See Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 400–401.

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* See, *e.g.*, the Seventh Circuit's discussion of the comparative treatment of applications for broadcast licenses and those for safety and special services (Pet. 9a–11a), again argued in the petition, pp. 12–13. Petitioners (pp. 7, 11) also urge that the Commission improperly levied fees on applications rather than on license grants. The court below correctly held that this issue was foreclosed by petitioners' failure to raise it before the agency (Pet. 8a). In any event, the processing of applications is plainly "work, service * * * or similar thing of value * * * performed" for an applicant within the meaning of 5 U.S.C. 140, warranting imposition of fees.

CONCLUSION

The decision below is clearly correct and poses no new or important issue of law. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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